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No. 630

In the Supreme Court of the United States

OCTOBER TERM, 1959

RUTH F. IVES, formerly RUTH F. ISENSTEIN,
PETITIONER

v.

WILLIAM B. FRANKE, Secretary of the Navy

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	6
Argument	8
Conclusion	14
Appendix	15

CITATIONS

Cases:

Allen v. *Grand Central Aircraft Co.*, 347 U.S. 535	12
Davis v. *Woodring*, 11 F. 2d 523	11
Fong Chew Chung, In re, 119 F. 2d 901	13
Greene v. *McElroy*, 360 U.S. 474	10, 12
Harmon v. *Brucker*, 355 U.S. 579	11
Norwegian Nitrogen Co. v. *United States*, 288 U.S. 294	12
Patterson v. *Lamb*, 329 U.S. 539	11, 13
United States v. *Eliason*, 16 Pet. 291	10, 11, 12

Statutes and regulations:

10 U.S.C. 1162 (based upon Act of July 9, 1952, c. 608, § 248, 66 Stat. 495)	12
10 U.S.C. 1552 (based upon Act of August 2, 1946, c. 753, § 207, 60 Stat. 812, 837)	12
10 U.S.C. 1553 (based upon Servicemen's Readjustment Act of June 22, 1944, c. 268, § 301, 58 Stat. 286, formerly found at 38 U.S.C. (1952 ed.) 693h)	11
10 U.S.C. 6291	2, 11
10 U.S.C. 6292 (based upon Act of September 24, 1945, c. 385 § 1, 59 Stat. 536)	12
10 U.S.C. 6294	2, 11
10 U.S.C. 6297(b) (based upon Act of June 3, 1916, c. 134, § 125, 39 Stat. 216)	11

Cases—Continued

	Page
Air Force Regulations 39-10 of September 21, 1949	9
Air Force Regulations 39-10A, change dated Mar. 21, 1957	10
Army Regulations 615-360 of December 6, 1922	13
Army Regulations 615-360 of May 14, 1917	9
Regulations for the Government of the Navy of the United States (1896):	
Paras. 801	9, 15
802	9, 15

Miscellaneous:

Bureau of Naval Personnel Manual, 1948, Para. C 10302	8
Bureau of Naval Personnel Manual, 1959, Para. C 10302	8
Bureau of Navigation, Annual Circular, dated January 1, 1918:	
Paras. 116	16
117	17
118	17
119	17
120	17
Bureau of Navigation Manual 1921, Para. D 8110	8
Bureau of Navigation Manual 1925, Para. D 9101	8
Bureau of Navigation Manual 1942, Para. D 9102	8
D.O.D. Directive No. 1332.14	9
Howland, *Digest of Opinions of the Judge Advocate General of the Army* (1912) 437, Para. III F. 1	13
Marine Corp Manual, 1949, Part E:	
Paras. 10252	2, 9
10253	1, 9
10269	1, 9
10270	5, 9
Navy Circular entitled "For the Information of Commanding Officers, Nov. 8, 1912," Para. 7	8, 15-16

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OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-9a) is reported at 271 F. 2d 469. The unreported order of the District Court for the District of Columbia appears in the Joint Appendix, p. 42.

JURISDICTION

The judgment of the Court of Appeals was entered on September 17, 1959. A motion for rehearing en banc was denied on October 13, 1959. The petition for a writ of certiorari was filed on January

5, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the Secretary of the Navy had authority to adopt regulations under which the petitioner was discharged from the women's branch of the Marine Corps with a general discharge under honorable conditions, rather than a honorable discharge, because of her failure to perform her duties with a minimum degree of proficiency.

STATUTES AND REGULATIONS INVOLVED

10 U.S.C. 6291 and 6294 provide:

§ 6291. Honorable discharges.

Honorable discharges, in the form prescribed by the Secretary of the Navy, may be granted to enlisted members of the naval service. [Based upon R.S. 1426, June 11, 1896, 29 Stat. 476.]

§ 6294. Women in the Regular Navy and Regular Marine Corps: termination of enlistment.

The Secretary of the Navy, under regulations prescribed by him, may terminate the enlistment of and discharge any enlisted woman in the Regular Navy or the Regular Marine Corps. [Based upon Act of June 12, 1948, c. 449, § 214, 62 Stat. 370.]

Marine Corps Manual, 1949, Part E provided (in 1952) in pertinent part:

10252 HONORABLE DISCHARGE

1. An honorable discharge requires excellent service, fulfillment of certain other conditions

herein stated, and eligibility for discharge for one of the following reasons:

a. Expiration of enlistment.
b. Convenience of the Government.
c. Dependency or hardship.
d. Minority.
e. Disability.

2. Excellent service is defined as being proficient in the performance of the duties commensurate with the rank held, being industrious and possessing a good conduct record, and having received a minimum final average of 5 in proficiency and 4.0 in conduct.

3. An honorable discharge will not be issued if the enlisted person has been convicted of an offense by general court martial or has been convicted by more than one special court martial in his current enlistment, period of induction, or any extensions thereof, unless such enlisted person has been awarded a Medal of Honor, Marine Corps Brevet, Navy Cross, Distinguished Service Medal, Silver Star Medal, Legion of Merit, Distinguished Flying Cross, Navy and Marine Corps Medal, Bronze Star Medal, Air Medal, Commendation Ribbon, Gold Life Saving Medal, Silver Life Saving Medal or any Army award comparable to the decorations listed above. Personnel so decorated are entitled to an honorable discharge provided their record, subsequent to the act for which they were rewarded or commended would so entitle them. Also, a person discharged as a result of a disability incurred in line of duty and resulting from action against an enemy, shall normally be given an honorable discharge regardless of previous service record and previous conduct and proficiency marks.

4. In an exceptional case where the commanding officer is of the opinion that the person concerned should not be given an honorable discharge in accordance with the foregoing instructions, a full report of the circumstances shall be forwarded to the Commandant of the Marine Corps for decision.

10253 GENERAL DISCHARGE

1. A general discharge is separation from the service "under honorable conditions." It is given for the same reasons as an honorable discharge and is issued to enlisted personnel whose conduct and performance of duty have been satisfactory but not sufficiently deserving or meritorious to warrant an honorable discharge. It is also given for inaptitude and unsuitability.

10269 HONORABLE DISCHARGE FOR DISABILITY

1. In effecting discharges for physical or mental disability, the character of discharge shall be given as indicated below unless otherwise directed by the Commandant of the Marine Corps. If a commanding officer believes an enlisted person is entitled to a character of discharge different from that indicated, he should so recommend to the Commandant of the Marine Corps, stating the reason therefor: see paragraph 10251-3.

2. An enlisted person discharged as a result of a disability, whether or not incurred in line of duty, provided not own misconduct, whose minimum final average marks are 5 in proficiency and 4.0 in conduct, and who has not been convicted by general court-martial or more than once by special court-martial, shall be given an Honorable Discharge, DD Form 256 MC. For the exception, see subparagraph 10251-3.

a. An enlisted person discharged as a result of disability incurred in line of duty and resulting from action against an organized enemy, shall normally be given an honorable discharge regardless of previous service record and previous conduct and final average marks. In any exceptional case where the commanding officer is of the opinion that the person should not be given an honorable discharge, a full report of the circumstances shall be sent to the Commandant of the Marine Corps (Code DGK) for a decision.

b. Enlisted personnel who upon reporting for active duty are found not physically qualified by reason of a disability which is reported on Standard Form 88, provided the disability is considered not due to own misconduct, shall be issued an Honorable Discharge, DD Form 256 MC, by reason of disability. Such discharges will be effected only when directed by the Commandant of the Marine Corps in individual cases.

10270 GENERAL DISCHARGE FOR DISABILITY

1. Personnel discharged for any of the following reasons shall receive a General Discharge, DD Form 257 MC:

a. Disability, whether or not incurred in line of duty, provided not own misconduct, where final average marks are less than 5 in proficiency and 4.0 in conduct, or the record shows conviction by general court-martial or more than once by special court-martial, unless otherwise directed by the Commandant of the Marine Corps. For the exceptions, see subparagraphs 10269-2a and 10251-3.

b. Disability due to own misconduct.

* * * * *

STATEMENT

The petitioner enlisted for three years in the Marine Corps (women's branch) on February 2, 1952 (J.A. 6-7). Prior to her enlistment she had attended college, where her major subject was psychiatric social service work, and had worked as a medical and psychiatric secretary (J.A. 8). Shortly before her enlistment she had applied for admission to a law school, and she enlisted on the assumption that her application had been denied. From the time she entered the service, her performance of her duties was poor and she regularly received low proficiency marks (J.A. 13-14). Although her behavior put her "in moderately serious difficulty on several occasions" (J.A. 9), her marks for conduct were average (J.A. 16-17).

Early in September, 1952, the petitioner requested a discharge from the Marine Corps. Her request was based upon "frustration resulting from her inability to do satisfactory work" on any of the five jobs she had had since entering the service. She also stated that she had been accepted by a law school, and that her assignments in the marines were "not commensurate with her intellectual endowment or ability" (J.A. 8-9).

Upon her request for a discharge she was referred to medical authorities "for psychiatric evaluation concerning her retention in the service" (J.A. 8). Her physical, neurological, laboratory and psychiatric examinations showed "no significant deviation from normal" (J.A. 9). Nevertheless, the medical board found that, although "fully competent to be dis-

charged into her own custody", she suffered from "an emotional instability reaction, characterized by fluctuating emotional attitudes, poorly controlled hostility and immature, impulsive judgment," which had existed prior to her entry into the service. The board recommended that she be discharged from the Marine Corps (J.A. 10). On October 20, 1952, upon being fully advised of the board's findings and recommendation, the petitioner acknowledged that she would not be entitled to disability benefits or other compensation, waived her rights to a hearing, and requested that she be discharged "as soon as possible" (J.A. 11). Prior to signing the waiver she apparently did not inquire about the character of the discharge which she would receive (J.A. 21). She was discharged on October 22, 1952 (J.A. 12-13) with a "General Discharge—under honorable conditions."

In November, 1953, the petitioner applied to the Navy's Board of Review, Discharges and Dismissals, for a review of her discharge (J.A. 19-20). That Board found that the petitioner's average grades in proficiency were not high enough to merit an honorable discharge, and that the character of the discharge originally issued was therefore proper (J.A. 27). The petitioner was informed of the Board's decision by letter dated February 1, 1954 (J.A. 28). In April, 1957, the petitioner took that decision to the Board for the Correction of Naval Records, which on July 23, 1957, found her appeal to be without merit (J.A. 29-32).

This action was brought on September 15, 1958 (J.A. 1). The parties agreed that there was no genuine issue of material fact and submitted the case on cross motions for summary judgment (J.A. 5). The district court was of the opinion that the defendant acted within his authority, and entered judgment for defendant (J.A. 42). The Court of Appeals affirmed (2-1), and denied a motion for rehearing *en banc* (8-1) (R. 72).

ARGUMENT

This case raises only one question, which the Court of Appeals decided correctly. The regulations attacked here, which make a minimum proficiency in the performance of duties one of the requirements for receiving an honorable discharge from the Marine Corps, are clearly valid. Review by this Court is therefore unwarranted.

In 1912, the Secretary of the Navy adopted regulations under which satisfactory performance of duty, as indicated by a prescribed minimum grade in proficiency, was a prerequisite to an honorable discharge for naval personnel.[1] Naval regulations with this requirement have remained in force ever since.[2] Even prior to that time enlisted personnel who did

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[1] See Circular letter of November 8, 1912, Appendix pp. 15-16, *infra*; this and other regulations are attached as an appendix to this brief for the convenience of the Court.

[2] *Bureau of Navigation Manual*, 1921, Para. D 8110; *Bureau of Navigation Manual*, 1925, Para. D 9101; *Bureau of Navigation Manual*, 1942, Para. D 9102; *Bureau of Naval Personnel Manual*, 1948, Para. C 10302; *Bureau of Naval Personnel Manual*, 1959, Para. C 10302.

not merit "a testimonial for fidelity, obedience, and *ability*" (emphasis added), received an "ordinary discharge" rather than an honorable discharge.[3]

In 1945, regulations were adopted for the Marine Corps which, like the Navy's, made a minimum grade in proficiency a prerequisite for an honorable discharge.[4] These regulations were substantially the same as those under which petitioner was discharged.[5] In 1947, the Army adopted similar requirements for honorable discharges,[6] and upon its acquiring the status of a separate service the Air Force did the same.[7] The Army, Navy, and Marines have retained these requirements.[8]

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[3] Regulations for the Government of the Navy of the United States (1896), 801, paras. (1) and (2), Appendix p. 15. All personnel who were discharged at their own request before the expiration of their term of service also received only ordinary discharges. *Id.*, 802, para. (c).

[4] Exhibit 3 in the Court of Appeals.

[5] Marine Corps Manual, 1949, Part E, Paras. 10252, 10253, 10269, 10270, set forth above at pp. 2-5.

[6] Army Regulations 615-360 of May 14, 1947 (ratings of "excellent" in "efficiency" were required).

[7] Air Force Regulations 39-10 of September 21, 1949.

[8] The petitioner's suggestion that the other services have adopted the Marine Corps' requirement "after the hearing of this case in the District Court" (Pet. 7-8) is without foundation. D.O.D. Directive No. 1332.14, to which counsel refers, cites and replaces a D.O.D. memorandum of August 2, 1948, which also allowed the services to consider proficiency in determining awards of honorable discharges. See paras. 4(a) and (b) to enclosure B of that memorandum. Moreover, the applicable Air Force and Army regulations which were printed in the petitioner's brief in the Court of

Neither in the lower courts nor in this Court has the petitioner charged discrimination or unfairness in the application of the regulations to her.[9] Nor was there any allegation or evidence of unfair procedures.[10] Only the validity of the regulations, and the respondent's authority to enforce them, have been assailed.

The authority of the executive to promulgate regulations for the government of the armed forces is beyond question, and the regulations adopted by the head of the department are those of the executive. *United States* v. *Eliason*, 16 Pet. 291. This Court has recognized the executive's authority to promul-

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Appeals, show that acceptable ratings for "efficiency" were required for honorable discharges from those services. Appellant's Brief, pp. 4-5. The only recent change of policy was the elimination of minimum efficiency grades in the Air Force regulations in 1957. Air Force Regulations, 39-10A, change dated March 21, 1957. See Appellant's Brief, pp. 6-7.

[9] In a footnote, Judge Bazelon in his dissenting opinion suggests that the applicable instructions concerning proficiency grades may not have been followed because a smaller percentage of the marines discharged in 1952 received general discharges than the instructions might indicate (fn. 1, Pet. App. 5a-6a). However, the instructions do not require a literal percentile grading. The percentages set forth are only a guide to grades, and an officer is free to give all the men under his supervision high grades (J.A. 14-16, see para. 3a). At any rate, the petitioner has not complained of the proficiency grades awarded her. Nor could she, since her request for discharge was based upon her admitted failure to do satisfactory work (J.A. 8).

[10] The petitioner's reliance upon *Greene* v. *McElroy*, 360 U.S. 474, is therefore misplaced.

gate regulations governing the type and character of discharge certificates to be given to persons leaving the armed services and to award less than honorable discharges in appropriate situations. *Patterson* v. *Lamb*, 329 U.S. 539.

Honorable discharges awarded only for satisfactory conduct and performance are intended to be an award for a job well done. See *Harmon* v. *Brucker*, 355 U.S. 579. These regulations provide an incentive to the affected servicemen to perform their duties adequately. As such they are clearly and rationally related to the government of the armed services, and would be valid even without specific statutory authorization. *United States* v. *Eliason*, *supra*; *Patterson* v. *Lamb*, *supra*; *Davis* v. *Woodring*, 111 F. 2d 523 (C.A.D.C.).

The applicable statutes, moreover, specifically make the award of honorable discharges discretionary with the Secretary of the Navy,[11] and give him broad authority to prescribe regulations concerning the termination of enlistment and discharge of enlisted women in the Navy and Marine Corps.[12] In addition, Congress, after the adoption of regulations using proficiency as a criterion for the award of honorable discharges, enacted several statutes which recognized, but did not prescribe any criteria for the award of various kinds of discharges.[13] Many thous-

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[11] 10 U.S.C. 6291. The text is set forth at p. 2, *supra*.

[12] 10 U.S.C. 6294. The text is set forth at p. 2, *supra*.

[13] 10 U.S.C. 6297(b) (based upon Act of June 3, 1916, c. 134, § 125, 39 Stat. 216); 10 U.S.C. 1553 (based upon Servicemen's Readjustment Act of June 22, 1944, c. 268, § 301,

ands of servicemen have been discharged under them. Consequently any remaining doubt as to the validity of the regulations in question would be eliminated by this long standing administrative interpretation, and Congressional acquiescence in and ratification of it. *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 310-315; *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 544-550; cf. *Greene v. McElroy*, 360 U.S. 474, 506.

Judge Bazelon's dissenting opinion below is based upon the premise that "until recently, an Honorable Discharge has issued to all persons whose *conduct* while in service was satisfactory" (emphasis added). While recognizing respondent's general authority to issue the regulations governing discharges, he believed that history had so bound honorable discharges to conduct, and not proficiency, that the respondents could not issue a less than honorable discharge for lack of proficiency (Pet. 7a-9a). His reasoning overlooks the principle, long established in this Court, that the authority to promulgate rules and regulations necessarily carries with it the authority to modify, repeal or establish anew. *United States v. Eliason*, 16 Pet. 291, 301. In addition, his premise

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58 Stat. 286, formerly found at 38 U.S.C. (1952 ed.), establishing administrative boards to review the kinds of discharges awarded); 10 U.S.C. 6292 (based upon Act of September 21, 1945, c. 385, § 1, 59 Stat. 536), which recognizes less than honorable discharges; 10 U.S.C. 1552 (based upon Act of August 2, 1946, c. 753, § 207, 60 Stat. 812, 837), establishing boards for correction of military records; 10 U.S.C. 1162 (based upon Act of July 9, 1952, c. 608, § 218, 66 Stat. 495).

was false because naval discharges have traditionally been awarded only to those who met the minimum standards of both conduct and proficiency."[11]

The petitioner also contends that the regulations are invalid because they "flagrantly discriminate between officers and enlisted personnel" (Pet. 8). We need not discuss the legal merit of the petitioner's position, because there is in fact no discrimination in this respect. The regulations for marine officers, like those for enlisted personnel, prescribe a general discharge rather than an honorable discharge for those whose service record shows "performance of duty of a consistently below average or unsatisfactory character" (J.A. 35, para. 3b(1)(d)).

The petitioner's service in the Marine Corps was neither dishonorable nor meritorious. Her general discharge (under honorable conditions) adequately reflects these facts. "The law demands no more." *Patterson* v. *Lamb*, 329 U.S. 539, 545.

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[11] See above, pp. 8-9. Judge Bazelon apparently was unaware of the long history of the requirement of minimum grades in proficiency for honorable naval discharges. However, even the history of the Army regulations, on which his reasoning is based, does not show a long tradition of awarding honorable discharges solely on the basis of conduct, rather than proficiency. In the early years of this century, discharges without honor were given "[f]or inefficiency." Howland, *Digest of Opinions of the Judge Advocate General of the Army* (1912) 137, Para. III F. 1. During the World War I era, soldiers discharged as "inapt" received less than honorable discharges (Judge Bazelon's opinion, fn. 8, Pet. App. 8a). After 1922 the so-called "blue discharge" was given to those who failed to meet minimum standards of efficiency. Army Regulations 615-360 of December 6, 1922; see also *In re Fong Chow Chung*, 119 F. 2d 901, 905-906, fn. 1 (C.A. 9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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FEBRUARY 1960.

APPENDIX

Early Naval Regulations and Instructions from "Compilation of Discharge Regulations from 1896 to 1925" prepared by the Bureau of Personnel, Dept. of the Navy, December 1, 1947.

1. Regulations for the Government of the Navy of the United States of 1896 provided in pertinent part:

> 801. (1) Any person in the Navy, enlisted for general service, who is recommended by his captain for a testimonial for fidelity, obedience, and ability during his term of service, and who is a desirable person to retain, shall, upon the expiration of his enlistment, receive an honorable discharge.
>
> (2) When deciding upon the claim of an enlisted man to an honorable discharge, the captain must give due weight to the recommendations of all other captains under whom the man may have served during his current enlistment, as shown by his enlistment record.
>
> 802. The following persons are entitled to an ordinary discharge only:
>
> (a) All who enlisted for other than general service.
>
> (b) All general-service men who are not recommended by the captain for a testimonial for fidelity, obedience, and ability during their term of service.
>
> (c) All who are discharged before the expiration of their term of enlistment at their own request, or for their own convenience.

2. Circular letter entitled "For the Information of Commanding Officers, Nov. 8, 1912" provided in pertinent part:

7. *Determination of character of discharge.*—In deciding whether an honorable or an ordinary discharge shall be awarded, the following rules shall govern:

(a) The first year's record of men in their *first enlistment* shall not be taken into consideration.

(b) A record of 4.5 each in sobriety and obedience during the last two years of a first enlistment, together with not less than an average of 3.0 in proficiency in rating for those years, shall entitle a man to honorable discharge, unless his previous record shows him to be undesirable for the service.

(c) No honorable discharge shall be given (except under rule (b), next above) to any man whose averages in proficiency in rating, sobriety, and obedience are less than 3.0 each, giving double weight to the marks of the final two years of his term of service.

(d) A man that has been awarded a medal of honor shall be entitled to an honorable discharge regardless of his previous record, provided his record subsequent to the act for which he was rewarded is worthy of honorable discharge under rule (c) next above.

(e) Similarly, a letter of commendation shall be given due weight in a man's favor against a previous unworthy record, provided his record subsequent to the act commended would entitle him to an honorable discharge.

3. The Annual Circular, Bureau of Navigation, dated January 1, 1918, provided in pertinent part:

116. In deciding whether an honorable or ordinary discharge shall be awarded the following rules shall govern:

An honorable discharge is a TESTIMONIAL OF FIDELITY AND OBEDIENCE. An honorable discharge shall not be given any man who has been convicted by general court-martial during his current enlistment, or who has been convicted by two summary courts during his current enlistment, or by a summary court within the last year of his current enlistment. If, however, the offenses were of over liberty amounting to less than 12 hours in times of peace, and the record is otherwise excellent, an honorable discharge may be given at the discretion of the commanding officer if his average marks conform to the bureau's instructions. If his enlistment has been extended, this applies to the last four years of enlistment, including the extension period.

117. In order to make this rule uniform, men who break their liberty more than 12 hours under no extenuating circumstances should be considered as having had a summary court in deciding the character of the discharge.

118. No honorable discharge shall be given to any man whose averages are less than 3.0 each in sobriety and obedience and 2.75 in proficiency in rating, giving double weight to the marks of the final two years of his term of service.

119. A man who has been awarded a medal of honor shall be entitled to an honorable discharge regardless of his previous record, provided his record subsequent to the act for which he was rewarded is worthy of honorable discharge, under rule next above.

120. Similarly, a letter of commendation shall be given due weight in a man's favor against a previous unworthy record, provided his record subsequent to the act commended would entitle him to an honorable discharge.

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